

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of: Alain LEAS et al.

Confirmation No.: 4476

Application No.: 10/797,373

Group Art Unit: 1761

Filing Date: March 9, 2004

Examiner: Viren A. Thakur

For: PACKAGED DECORATED FROZEN  
CONFECTION AND METHOD OF  
MANUFACTURE

Attorney Docket No.: 88265-74701

**DECLARATION OF ALAIN LEAS UNDER 37 C.F.R. § 1.132**

**Mail Stop Amendment**

Commissioner for Patents

P.O. Box 1450

Alexandria, Virginia 22313-1450

Sir:

I, **Alain LEAS**, do declare that:

1. I am a citizen of The United States of America and reside at 5927, St. Fillans Court, Dublin, OH 43017
2. I hold a Bachelor Degree in Chemistry from University of Liege (Belgium).
3. I am one of the named inventors in the above-identified application. I presently hold the position of Sr. Research Scientist at Nestec S.A., the assignee of the present application, where I am responsible for New product development activities. I have held this position for 7 years. In particular, I have been specifically involved in research and development of new ice cream coatings products and technologies. My experience includes work on product analysis, physico-chemical characterization, chocolate, confectionery and ice cream products development and factory troubleshooting. I have been actively involved in such type of work for 24 years.
4. I have reviewed and understand the above-identified application, the pending claims thereof, the pending Office Action, U.S. Patent No. 6,235,324 to Luigi Grigoli et al. ("Grigoli"), European Patent Application No. EP 0848910 to Kuehl ("Kuehl"), European

Patent Application No. EP 276333 to Damato ("Damato"), Japanese Publication JP 2000-118590 to Tanaka et al. ("Tanaka"), U.S. Patent No. 5,425,527 to Selbak ("Selbak"), and U.S. Patent No. 2,106,893 to Krein ("Krein"). I am making the following statements as one of ordinary skill in the art in support of the patentability of the pending claims.

5. The above-identified application is directed to a packaged decorated composite frozen confection product. The product includes an open-ended shell with a decorative pattern design forming a smooth surface of the outer wall of the shell, a filling of a frozen confection at least in the interior volume of the shell, and a packaging sleeve for protecting all of the outer surface of the shell. The shell is made of a solid, fat-based composition and has a shell wall that defines an interior volume for holding at least a portion of an ice confection therein. The shell wall has a substantially smooth outer surface. The pattern design includes strings of a first semi-solid confection material that form a mesh of strings and a second confection material of a contrasting color to that of the first confection material located between the strings. The packaging sleeve is formed in a shape that corresponds to the desired shape of the outer surface of the shell and has an inner surface that is in contact with the outer surface of the shell to form and display the pattern. The entire packaging sleeve is partly or entirely transparent, and the entire outer surface of the shell is in complete surface-to-surface contact with the packaging.

6. Grigoli relates to a product in which ice cream is contained inside a chocolate shell, which is then inserted in a wafer. The chocolate shell extends along all the inside surface of the wafer and projects for a certain portion upwardly beyond the wafer. The chocolate shell can be higher than the wafer, extending to the outer surface of the product, which is then finished by applying a decoration and/or a dosage of chopped almonds after its solidification. After manufacture, the product is inserted into a paper cone or envelope.

7. Kuehl discloses a marbled confectionary coating for ice cream. The coating is prepared from a coating material, which may be chocolate, or a water-based material such as creamy mixes, non-aerated ice cream mixes, sorbets, water ices, or fruit purees. Kuehl teaches that coatings in which one layer consists of either milk or plain chocolate and the other layer consists of white chocolate are the most interesting visually because there may be a marked contrast between the milk or plain chocolate and the white chocolate. Kuehl does not disclose a packaging sheet for wrapping the bars, and either places strips of chocolate in a mold

or applies stripes or dots of chocolate upon an ice confection in the shape of a bar. Thus, Kuehl does not teach that a chocolate shell is in complete surface-to-surface contact with a packaging sleeve. Kuehl focuses instead on the provision of different colors or surface contours to provide a visually interesting product during consumption.

8. Damato is directed to a container for receiving an ice cream cone. A lid is fitted for closing the conical opening of the container. The container and the lid consist of a liquid-tight, transparent material to make the package of ice cream visible to the consumer.

9. Tanaka relates to an ice cream container that allows ice cream to be eaten with a spoon as in a cup-shaped container. A cone-shaped container is provided by integrating a cone cup for housing ice cream, a lower cup portion for accommodating the cone cup, and an upper cup portion. The cone cup is made from a wafer.

10. Selbalk discloses a cone-shaped shell of baked cookie dough for holding ice cream or the like. Moisture absorbing particulate ingredients, such as chocolate chips, baking chips, nuts and candy pieces, may be included in the dough.

11. Krein relates to a method of making a frozen confection package wherein ice cream, sherbet, or the like is provided with a chocolate covering and the whole is contained in a temporary wrapper. The method is characterized by the seating of a wrapper in a holder with marginal portions overlapped but ungummed, and a spraying of the chocolate into the wrapper. The chocolate adheres to the inside surface of the wrapper and retains it in its desired form. The confection is frozen in the wrapper after the latter has been sprayed with the chocolate. Krein uses a paper wrapper to enclose its product.

12. Grigoli does not teach or suggest that the packaging sleeve protects all of the outer surface of the shell, or that the entire outer surface of the shell is in complete surface-to-surface contact with the packaging sleeve. Grigoli's chocolate shell is first inserted into the wafer, and then inserted into a paper cone. Therefore, the paper cone does not protect or contact the whole outer surface of the chocolate shell as in the present invention. Nor does he disclose the use of a transparent plastic sleeve to display the shell prior to removal from the package.

13. There is no suggestion or motivation to combine Grigoli with Kuehl. There is nothing in Grigoli that suggests that a pattern design should be placed on the chocolate shell. By inserting the chocolate shell into the wafer, and by positioning the wafer and upper portion of the chocolate shell in a paper envelope, there would be no advantage in appearance of Grigoli's product, since the consumer would only see the envelope or only a portion of the chocolate shell and a wafer cone and not the inner chocolate shell. Grigoli's chocolate shell is mostly hidden within the wafer.

14. Grigoli's decoration of the cone involves dosing on the upper surface a certain quantity of chopped almonds or by applying a decoration of liquid chocolate, syrup, or other topping. Grigoli's topping decoration is significantly different and much simpler to achieve than the marbled appearance of Kuehl's bar. One of ordinary skill in the art would not look to Kuehl to further decorate Grigoli's cone. Kuehl teaches attractive coatings for ice cream bars, not chocolate cone-shaped products.

15. The primary purpose of Kuehl is to impart an attractive appearance to its chocolate bars, rather than impart a more pleasing taste. This is evidenced by Kuehl's emphasis on the different patterns, shapes, or colors of the coatings. The maintenance of a smooth outer surface is not of significance to Kuehl's products. Smoothness is incidental and requires an additional step (i.e., placement of different colored chocolate strips in a mold) to accomplish. Kuehl also does not utilize a sleeve that conforms to the outer surface of the confection. In contrast, the present invention is made in a much less complicated manner, with the strings being provided to conform to and be in contact with a packaging sleeve of similar dimensions during formation of the shell so that a smooth outer surface is automatically achieved during formation of the product.

16. There is no suggestion or motivation to combine Kuehl with Damato. Damato is concerned with conical ice cream products, not bars. Ice cream bars would not require a separate container and lid, as taught by Damato. Damato also does not appear to teach a chocolate shell, but a wafer cone, which is absent from Kuehl.

17. There is no suggestion or motivation to combine Grigoli with Tanaka. Grigoli shows that the ice cream filling is contained within the chocolate shell and does not extend above it and onto the paper cone. Modifying Grigoli in view of Tanaka so that the ice

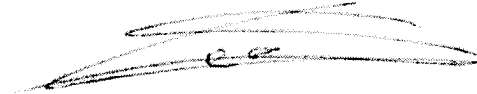
cream extends over the cone and contacts the paper cone would not be ideal. When the ice cream melts, it would flow behind the chocolate layer where it could wet the wafer and make it soggy and unappetizing. The ice cream would also wet the paper cone, making it sticky.

18. There is also no suggestion or motivation to combine Kuehl with Selbalk. Kuehl is concerned with chocolate bars that do not include a cone, while Selbalk relates to cookie dough cones.

19. There is no motivation or suggestion to include a decorative pattern on the surface of the chocolate shell of Krein. Like Grigoli, Krein uses a paper wrapper to enclose its product instead of the partially or entirely transparent packaging sleeve of the present invention. Krein is not interested in the appearance of his product, but is focused on providing an efficient and economic method of making a frozen confection package provided with a chocolate covering and contained in a temporary wrapper. There would be no advantage in including a decorative pattern design on the shell of Krein, since the consumer would only see the wrapper, and not any pattern on the shell.

20. I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application, and any patent issuing thereon.

Dated: July 2<sup>nd</sup>, 2007



Alain LEAS